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ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS
JUNEAU REGULATORY FIELD OFFICE
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FEB 21 2014

Regulatory Division
POA-2006-597

Mr. Tim A. Haugh
U.S. Department of Transportation
Federal Highway Administration
Post Office Box 21648
Juneau, Alaska 99802-1648

Dear Mr. Haugh:

This letter provides the U.S. Army Corps of Engineers (Corps) comments on the Preliminary Draft Supplemental Environmental Impact Statement (PDSEIS) dated January 2014, for the proposed Juneau Access Improvements Project (JAI), in Juneau, Alaska. These comments are preliminary to the submittal of an application for a Department of the Army (DA) permit at which time the Corps will comment further on the proposed project.

Project Purpose and Need: The Alaska Department of Transportation and Public Facilities' (ADOT&PF) stated purpose and need in the PDSEIS is to provide improved surface transportation to and from Juneau within the Lynn Canal corridor that will:

- Provide the capacity to meet transportation demand in the corridor
- Provide flexibility and improve opportunity for travel
- Reduce travel times between the communities
- Reduce State costs for transportation in the corridor
- Reduce user costs for transportation in the corridor

The definition of overall project purpose is used in the determination of practicable alternatives since the Environmental Protection Agency's (EPA) 404(b)(1) Guidelines (Guidelines) define practicable to mean: "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of the overall project purposes."¹ While the definition of overall project purpose is solely the Corps' responsibility, it must take into consideration the applicant's stated purpose for the project.² It cannot be so restrictive that the applicant's proposal is the only possible alternative or so broad that it makes the search for alternatives meaningless.

As the Corps did in 2008, after considering the ADOT&PF's stated project purpose and need, we will define the overall project purpose as: To provide improved surface transportation with increased capacity to meet demand, provide flexibility, improved opportunity for travel, and reduced travel time between the Lynn Canal communities of Juneau, Haines, and Skagway.

¹ 40 CFR 230.10(a)(2)

² October 15, 1999, Army Corps of Engineers Standard Operating Procedures for the Regulatory Program.

The Corps will not include the cost components used by the ADOT&PF in their purpose and need statement. To include cost components, "reduce State costs for transportation in the corridor, and reduce user costs for transportation in the corridor," would narrowly restrict the Clean Water Act (CWA), Section 404 alternatives analysis to just one alternative, the ADOT&PF's preferred alternative. However, costs will be considered in our analysis of practicable alternatives.

Alternatives: CWA, Section 404 permits are only issued for projects that clearly demonstrate compliance with the Guidelines. The Guidelines state that no discharge of dredged or fill material can be permitted if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, as long as the alternative does not have other significant adverse environmental consequences. In those cases where non-water dependant work is proposed in a "special aquatic site", (such as wetlands, eelgrass beds, or mudflats), practicable alternatives are presumed to exist unless clearly demonstrated otherwise by the applicant. Also, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. Based on the information provided in the PDSEIS and available to us, we have determined that special aquatic sites occur within the proposed project area.

An alternative is considered practicable if it is available and capable of being accomplished after taking into consideration costs, existing technology, and logistics in light of the overall project purpose. The least environmentally damaging practicable alternative may include construction in uplands, reducing the size of the proposal to the minimum discharge necessary for the project, or the inclusion of logistic and operational controls.

In our 2008 Record of Decision (ROD) on the JAI, the Corps determined that "Alternative 3 would have unacceptable adverse impacts on Endangered Species, and was not an acceptable alternative. Alternative 3 was replaced by Modified Alternative 3 at the recommendation of EPA to avoid impacts to endangered species."³ During the development of the 2006 Environmental Impact Statement and our subsequent 2008 ROD, the species of concern was the eastern Distinct Population Segment (DPS) of Stellar Sea lions (*Eumetopias jubatus*). This DPS was recently determined by the National Marine Fisheries Service to no longer be threatened and was delisted in 2013.⁴ Thus Alternative 3 would be acceptable for the purposes of the JAI alternative analysis.

The PDSEIS should consider the delisting of this DSP relative to the range of practicable alternatives for the JAI.

Based on our review of the information provided in the PDSEIS, Alternative 3 and Alternative 2b would impact approximately 37.8 acres and 92.8 acres of waters of the United States, including wetlands, respectively. In this respect, it is clear that Alternative 3 is less damaging to the aquatic ecosystem than Alternative 2B. Also, in light of the Corps' definition of the overall project purpose, Alternative 3 appears to be practicable.

Compensatory Mitigation: Under the Corps' substantive evaluation criteria for all Section 404 CWA permits, the Guidelines, mitigation is a sequential process of avoidance, minimization, and compensation. Compensatory mitigation is not considered until after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem.

The Corps and the EPA issued regulations that govern national compensatory mitigation policy for activities in waters of the United States, including wetlands, authorized by Corps permits. The final mitigation regulations were published in the federal register on April 10, 2008, and became effective on

³ See Corps Record of Decision section VIII. Analysis of the Least Environmentally Damaging Practicable Alternative.

⁴ November 4, 2013, letter from the National Marine Fisheries Service to the Alaska District.

June 9, 2008. The final regulations at 33 CFR Part 332 establishes standards and criteria for the use of appropriate and practicable compensatory mitigation for unavoidable functional losses of aquatic resources authorized by Corps permits.

Avoidance measures are the planning strategies that entirely eliminate the discharge of fill material into the aquatic ecosystem to achieve the project purpose. A key requirement of compliance with the avoidance sequence of the Guidelines is to show whether or not an aquatic resource can be completely avoided. Minimization entails measures to reduce or diminish the impacts to aquatic resources. The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits.

There are two overarching themes that affect how the mitigation sequencing is conducted. One is that although the burden of proof for satisfying these steps rests with the permit applicant, the Corps must rely upon its own analysis in making a finding of compliance or non-compliance with the Guidelines. The applicant must provide information that is sufficient to determine compliance, so the Corps can make a timely permit decision. The information provided in the mitigation section of the PDSEIS is not substantive or specific to the proposed work for the Corps' Guidelines analysis.

The information provided in the PDSEIS and accompanying documents state that the ADOT&PF proposed compensatory mitigation for unavoidable impacts to waters of the United States that would consist of: 1. "[T]wo, 100-foot-wide wildlife underpass at the location of identified bear travel corridors between the Lace River and Antler River, as out-of-kind compensatory mitigation for impacts to forested and scrub/shrub wetlands habitat functions". 2. An in-lieu-fee payment of \$324,000 to the National Marine Fisheries Service for the construction of two artificial reefs at Yankee Cove, in Juneau. 3. An in-lieu-fee payment of \$1,038,000.

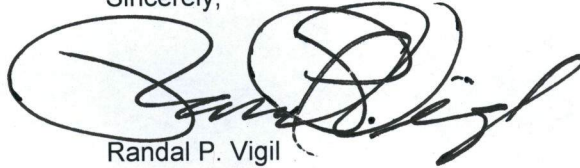
The compensatory mitigation regulations establish performance standards and criteria for permittee responsible and in-lieu fee compensatory mitigation in order to improve the quality and success of mitigation projects for proposed activities which would be authorization by a DA permit. In 33 CFR 332.3(b), we have established a preference hierarchy for compensatory mitigation options (i.e., mitigation banks, in-lieu fee programs, and permittee-responsible mitigation). All proposed compensatory mitigation projects must comply with the guidelines and requirements outlined in the regulations at 33 CFR 332. Individual compensatory mitigation plans must undergo prior review and approval in accordance with the regulations in this part.⁵

Because the proposed JAI would result in the loss of waters of the United States, including special aquatic sites, a compensatory mitigation plan is a necessary component of the Supplemental Environmental Impact Statement (SEIS), and the Corps expects the Final SEIS to include sufficient information about how the proposed compensatory mitigation relates to the individual and cumulative impacts to aquatic resources within the proposed project area, including an assessment to quantify debits and credits for aquatic resource impacts and compensation. The information provided in the PDSEIS does not demonstrate a nexus between the proposed compensatory mitigation and the acres or functions of waters of the United States that would be lost, as a result of the JAI. The wildlife underpasses do not qualify as compensatory mitigation for the loss of aquatic resources or their functions, because they would be constructed in uplands for bears, which are a terrestrial species. The Alaska District does not have an in-lieu-fee program agreement with the National Marine Fisheries Service. However, with the submittal a compensatory mitigation plan the proposed artificial reefs may be eligible for compensatory mitigation credit for off-setting aquatic resource impacts at a one-to-one ratio. If the ADOT&PF intends to fulfill their compensatory mitigation obligation by securing credits from an approved in-lieu-fee program, their mitigation plan must state who the in-lieu-fee would be paid to and quantify the debits that would be covered by the credits that would be secured.

⁵ See 33 CFR 332.4

Thank you for the opportunity to comment. You may contact me via email at Randal.P.Vigil@usace.army.mil, by mail at the address above, or by phone at (907) 790-4491, if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Randal P. Vigil". The signature is stylized with large, overlapping loops and a long, sweeping tail.

Randal P. Vigil
Project Manager

CF:

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